FILED
AUG 3 1979
MICHAEL RUBAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-469

NORMAN B. OPPENHEIMER
Petitioner,

versus

ELECTRO-NUCLEONICS, INC.,
AVELINO FIEL
ESTATE OF ALFRED BERG, BERTHA
L. BERG AS EXECUTRIX
HAROLD WM. HARRISON
HERBIERTO FEBUS BERNARDINI
MARIANO CABRERA
CONBOY, HEWITT, O'BRIEN AND
BOARDMAN, ESQS., A PARTNERSHIP
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN B. OPPENHEIMER
Pro se
Petitioner
1551 Second Avenue
New York, New York 10028
Phone: (212) 799-9680

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF FACTS 5

THE EVIDENCE 9

REASONS FOR GRANTING THE WRIT 17

CERTIFICATE 19

APPENDICES

A—Opinion of the United States Court of Appeals, Dated, April 4, 1979 ..... 1a

B—Judgment, dated September 13, 1978 ..... 5a

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

NORMAN B. OPPENHEIMER,
Petitioner,

versus

ELECTRO-NUCLEONICS, INC.,
AVELINO FIEL
ESTATE OF ALFRED S. BERG,
BERTHA L. BERG AS EXECUTRIX
HAROLD WM. HARRISON
HERBIERTO FEBUS BERNARDINI
MARIANO CABRERA
CONBOY, HEWITT, O'BRIEN AND
BOARDMAN, ESQS., A PARTNERSHIP,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

NORMAN B. OPPENHEIMER, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on the 4th day of April, 1979.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is attached hereto as Appendix A, infra page 1a. The judgment of the United States District Court for the Southern District of New York, in these consolidated actions appears at Appendix B, infra page 5a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 4, 1979. Petitioner timely filed his Petition for Rehearing on the 12 day of April, 1979, said petition being denied by the Circuit Court of Appeals on the 14th day of May, 1979. The jurisdiction of the Supreme Court is invoked under Title 28, S1245 of the United States Code.

QUESTIONS PRESENTED

I. Whether the Court of Appeals by not making a determination of that part of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings in not allowing petitioner a forum for a hearing of damages sustained against interpleader pursuant to 1969 decree of original Lower Court Judge, as ordered in these consolidated actions (?)

II. Whether the Court of Appeals by not making a determination of that portion of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings wherein the Lower Court after trial went outside the record to public records in its determination of petitioner's entitlement of damages (?)

III. Whether the Court of Appeals by not making a determination of that portion of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings which has prevented petitioner from proceeding with his complaint against certain defendant respondents, alleging their violations of 28 U.S.C. 1343 (?)

IV. Whether the Court of Appeals by not making a determination of that portion of petitioner's petition has sanctioned the Lower Court's departure from accepted judicial proceedings by enjoining petitioner from having any witnesses appear on his behalf at trial in these consolidated actions, against certain defendant-respondents therefore, denying, petitioner having a fair trial under the law (?)

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. (a). The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(2) the plaintiff has deposited such money or property or has paid the amount of or the loan

or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy. Title 28, U.S.C. 1335 (a) (2)

2. The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; Title 28 S1343 (1) (2)

3. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation. U.S. Constitution Amendment V.

4. All personal property which is the object of commerce may be given as a pledge, provided it be capable of being possessed. Title 31 S5022 Laws of Puerto Rico.

5. As long as the thing in pledge is not taken by eminent domain, the debtor continues to be the owner thereof. Nevertheless, the creditor may exercise the actions which pertain to the owner of the thing pledged, in order to recover or defend it against a third person. Title 31 S5026 Laws of Puerto Rico.

6. A Creditor to whom the debt has not been paid at the proper time may proceed, before a notary, to alienate the pledge. This alienation must necessarily take place at public auction, and with the citation of the debtor and the owner of the pledge in proper case. If the pledge should not have been alienated at the first auction, a second one, with the same formalities, may be held, and should no result be attained the creditor may become the owner of the pledge. In such case, he shall be obliged to give a discharge for the full amount of his credit. Title 31 S5030 Laws of Puerto Rico.

STATEMENT OF FACTS

Petitioner Norman B. Oppenheimer was awarded a judgment of approximately $109,000 against four

defendants in September, 1978, after two trials in these consolidated actions, originally commenced as an alleged interpleader by respondent Electro-Nucleonics, Inc., in April, 1969 after they were served with a judgment and order rendered for petitioner in a lawsuit in District Court for Puerto Rico in March, 1969, which decreed that petitioner was always the owner of a registered stock purchase warrant No. W104 issued and delivered by Electro to petitioner, a former resident, then, of the Commonwealth of Puerto Rico in 1965. The warrant entitled petitioner the right to exercise said warrant to purchase the underlying shares of Electro's common stock.

The warrant became the subject of the lawsuit in the United States District Court for Puerto Rico, supra, after it had been stolen in 1965 by Benjamin Rodriquez (a judgment debtor in default in these consolidated actions) from respondent Herbierto Febus Bernardini (attorney in Puerto Rico, cousin to Rodriquez) who held it in escrow for the performance of a lease agreement between two Puerto Rican corporations.

From 1965 and thereafter, Electro was on notice with respect to petitioner's stolen property and his attempts to recover same, including the litigation commenced in Puerto Rico.

In February 1968, petitioner made his timely and lawful exercise of his warrant to Electro, which exercise was rejected in favor of respondent Avelino Fiel, whose exercise of the warrant was accepted by Electro, in turn all of the shares of the stock was issued and delivered by Electro to Fiel (including split shares stock) for further distribution to Alfred S. Berg (deceased, a former officer, director and general counsel to Electro, the Estate of Mr. Berg is a respondent) who received a part, the remainder of the shares were

held by Fiel's former counsel, for subsequent distribution to Rodriquez, his partner John Simak (brother-in-law to Fiel), and to other parties as shown in the record of trial.

The alleged interpleader complaint by Electro, included petitioner and Fiel as defendants, plus all of the parties named as defendants in the Puerto Rican action, supra (they never appeared nor answered the interpleader complaint and were never enjoined by the court). Electro in its complaint requested that petitioner be restrained as well as Fiel, however, the only party subsequently enjoined was petitioner, who was temporarily restrained pursuant to a signed ex parte order, which restrained petitioner and the *father* of Fiel, likewise the order to show cause and the complaint was served on Fiel's *father* pursuant to directions by Electro and their counsels who caused a settlement notice to be served on Fiel's *father*, which left Fiel free to trade, hypothecate and use the shares of stock, as directed by the various parties in this scheme to defeat petitioner's rights to his property.

The court in granting the injunction May, 1969, directed Electro's posting of security, and:

> "ORDERED, ADJUDGED AND DECREED, that the plaintiff be and it hereby is discharged from any and all further liability except to the party who the Court shall adjudge is entitled to execute Warrant No. W104;"

Petitioner served a complaint in 1970 against Electro and others, alleging that defendants there were all parties to a scheme to defeat petitioner's rights in the warrant, including, violations of 15 U.S.C. 77q (a) and 78j (b). The complaint was dis-

missed against Electro and their transfer agent on grounds that petitioner was in violation of the interpleader restraining order.

Prior to trial February 4 and 5, 1974, petitioner was enjoined by the court (assigned in 1972 for all purposes) from subpoenaing any witnesses to appear on his behalf at trial where the sole issue determined was the ownership of the warrant, which the court determined that: "the true owner of the warrant is Mr. Oppenheimer."

Petitioner's trial counsel thereafter, was granted permission to serve an amended complaint, which included violations of 28 U.S.C. 1343 (1) (2) (Civil Rights), as alleged against Electro, respondents Conboy, Hewitt, O'Brien and Boardman, Alfred S. Berg and Harold Wm. Harrison, however, the court prevented petitioner from proceeding against Electro, an appeal was taken to the Second Circuit Court of Appeals which denied the petition as being premature, that Court, directed the consolidation of both lawsuits.

Further permission was granted to petitioner's counsel to update and amend the complaint, thereafter, certain parties moved for and were granted summary judgment. This matter was the subject of an appeal to the Second Circuit Court of Appeals, which dismissed the petition with leave to file another notice after final judgment.

On December 30, 1975 trial was held to determine damages against Fiel and defendants in default, as well as petitioner's complaint against the remaining parties to his complaint, Bernardini and Mariano Cabrera. Again, permission to have witnesses subpoenaed to appear to testify for petitioner, was denied by the court.

Pursuant to the court's September 15, 1976 findings after trial, petitioner's complaint against Bernardini and Cabrera was dismissed and an award of damages was given to petitioner against Fiel and others, supra. Petitioner's motion to modify the award was denied, and final judgment was entered September 13, 1978.

A direct appeal was filed to the Second Circuit Court of Appeals and oral argument was heard on the 4th day of April, 1979. The decision of the Court of Appeals was to affirm the September, 1978 judgment. Said decision was issued in an order, dated April 4, 1979.

A petition for Rehearing was filed, pursuant to Rule 40, Federal Rules of Appellate Procedure, on April 12, 1979, said petition being denied by the Court of Appeals on May 14, 1979, whereupon, petitioner files this application for Writ of Certiorari in the United States Supreme Court.

THE EVIDENCE

The Court of Appeals, in its April 4, 1979 decision, refers to an opinion of the lower court of June 21, 1974, directive (order of the Court of Appeals, page 1). The 1974 opinion stated: "The plaintiff (Electro-Nucleonics, Inc) by order of the Court (Metzner, J.) entered May 22, 1969, was discharged from all further liability in the case, 'except to the party the Court shall adjudge is entitled to execute the warrant No. W104.' By the same order, the Court noted that the common stock warrant in issue had been deposited with the Clerk of the Court. It noted further that plaintiff had filed security in the amount of $25,000; as a result, defendants Fiel and Oppenheimer were enjoined from pur-

suing or instituting any other actions against plaintiff with respect to the ownership of and the right to exercise the warrant." When petitioner's counsel was thereafter denied a forum to determine petitioner's claims of damages against Electro, an appeal was taken and argued November 4, 1974 before the Second Circuit Court of Appeals, which dismissed the petition on grounds of being brought on prematurely. Petitioner, respectfully asserts, that after the final judgment was entered, supra, as part of his appeal to the Court of Appeals, the same petition was again raised, to determine petitioner's entitlement to his claims of damages against Electro, as mandated in the May 22, 1969 order, supra, and, this portion of petitioner's appeal, was undecided, by the Court.

The June 21, 1974 opinion clearly states that the court made no determination as to the merits of petitioner's claims for any damages against Electro at the February 4, 5, 1974 trial, that: "The only issue now before this court, and the only issue now decided, is the true owner of the warrant and shares issued pursuant thereto as between Fiel and Oppenheimer." Further, the opinion stated:

> 2. There is pending in this Court another action brought by Oppenheimer against plaintiff and others in which he alleges that defendants there were all parties to a scheme to defeat his rights in the warrant. *None of these issues is decided except as to Fiel as indicated.*
>
> 3. The issue of damages as to Fiel will be tried with the case *Oppenheimer* v. *Electro-Nucleonics, Inc., et al.*, 70 Civ. 5667. Oppenheimer may also be entitled to costs and counsel fees as against Fiel and/or others to be determined at the trial of 70 Civ. 5667 upon a showing of bad faith."

The court made no determination of the liability issue, or respondent's entitlements to costs and counsel fees, as against Electro, if any. No disposition was made on the issue of the bond, that was posted by Electro for possible damages, and clearly, from the record of trial, reserved those issues for the later trial, which was held December 30, 1975. However, the issues tried at that trial, were the claims against Bernardini and Cabrera, and the damages against Fiel and defendants in default in these consolidated actions.

The Court of Appeals was apprised by the record on the appeal taken November 4, 1974 by petitioner's counsel's affidavit:

> "15 That, the interpleader complaint *Electro-Nucleonics, Inc.*, v. *Oppenheimer 69 Civ 1616* defendant-appellee 'ELECTRO' prayer for relief included the following (*Appellant's Appendix p. 112, l. 7 thru 11 inclusive)*
> *'(f)* That upon the deposit into the registry of this Court of Warrant No. W104, the plaintiff herein be discharged from all liability in the premises *except to the party who the Court shall adjudge is entitled to execute Warrant No. W104;*
>
> 16. That, one Myron D. Cohen, an attorney associated with the defendant-appellee 'ELECTRO's' then counsel, Conboy, Hewitt, O'Brien and Boardman (defendants in this proceeding), by sworn affidavit, on April 17, 1969, in support of an application for an order to show cause, stated the following: (*Appellant's Appendix, p. 115, l. 25 thru 30 inclusive*)

'3. Requiring said defendants to show cause at a time and place to be fixed by the Court, why said order or injunction against them and each of them should not be made permanent, and why the plaintiff herein should not be discharged from any and all further liability *except to the party who the Court shall* adjudge is entitled to execute Warrant No. W104;

17. That, an order to show cause in the interpleader *Electro-Nucleonics* v. *Oppenheimer 69 civ. 1616*, was signed on April 23, 1969, by Judge Milton Pollack, which stated: (*Appellant's Appendix, p. 43, 1. 11 thru 15 inclusive*)

'ORDERED, that Warrant No. W104, deposited on April 18, 1969 in the Registry of this Court by plaintiff, be retained therein to abide the determination of this proceeding or the further order or decree of this Court with respect to the subject matter of the controversy:'

also (*Appellant's Appendix p.43, 1.24*)
'ORDERED, on conditioned that security is furnished pursuant to Rule 65 (c) in the amount of $25,000____ '

also (*Appellant's Appendix, p. 44 1. 6 thru 9 inclusive*)
'WHY the plaintiff herein should not be discharged from any and all further liability *except to the party who the Court shall adjudge is entitled to execute Warrant No. W104,* ____ '

19. The view expressed by dependent herein, that the appropriate forum for damages and other

relief sought against defendant-appellee 'ELECTRO' should also have been aired in the interpleader action (*Electro-Nucleonics* v. *Oppenheimer, 69 civ. 1616*), was shared by Alfred S. Berg (now deceased), then general counsel to defendant-appellee 'ELECTRO' (see *Appellant's Appendix, p. 208, 1. 21 thru 26 inclusive*):

'The proper forum for plaintiff to litigate any claim for damages against Electro-Nucleonics for failure to honor his purported exercise of the stock warrant should be in the interpleader action inasmuch as plaintiff had therein insisted that Electro-Nucleonics put up a bond to indemnify him against losses caused by its actions therein.' "

The record before the Court of Appeals, is quite clear with respect to petitioner's request that a determination of the issue with respect to the May 22, 1969 mandate of the lower court should be decided, and, petitioner strongly suggests that to date, this has not been determined.

·II.

Further, the Court of Appeals denied the appeal of petitioner with respect to his claim that the amount of the judgment obtained was too small (order of the Court of Appeals page 2). The court stated: "...and we hold that the finding of damages in the amount of approximately $109,000 ($25,000 of which is in the nature of punitive damages) is not clearly erroneous, nor indeed ungenerous."

The damages awarded petitioner after trial, in the September 15, 1976 findings by the court, referred to,

by the Court of Appeals (order of the Court of Appeals, page 1), determined: "In the court's view, the appropriate figure for the determination of damages should be obtained by taking the value of the stock (mean between the bid and offered prices) *on February 23, 1968,* ..."

Petitioner respectfully asserts that the record of trial on December 30, 1975, did not establish value as of February 23, 1968, and nowheres, either in the February 4, 5, 1974 trial or any document in the records in these consolidated actions was there any reference to valuation on February 23, 1968, and, undoubtedly, the court went beyond the record, to public records.

The transcripts of the December 30, 1975 trial, uncontroverted, warranted the establishment of damage of the value of the stock, either on July 15, 1968, or at minimum, on April 15, 1969 at pages 37 to 39, 102, which included respondent's exhibits '8' and '9' at trial, established respondent's contention of his entitlement to value as of July 15, 1968, and/or April 15, 1969.

The valuation determined as of July 15, 1968 was made part of the court's pretrial order, dated December 16, 1975.

Further, part of petitioner's appeal to the Court of Appeals with respect to his entitlement to interest on the value of the stock, whether it be determined, even as of February 23, 1968, was likewise part of the pretrial order, and was part of the trial record 39, 100, 102 and 105.

Petitioner would show, that using the July 15, 1968 date, it would be a true indication of the market value

at the earliest date that the stock could and would have been sold had Electro issued these unregistered shares to petitioner on February 23, 1968. Alternatively, on April 15, 1969, a registration statement filed by Electro with the Securities and Exchange Commission became effective, which included for the benefit of its "unregistered" shareholders, who sold over 82,000 shares of stock, and had these unregistered shares been issued to petitioner on February 23, 1968, they could have and would have been included in the registration statement, of those shareholders, similar in nature, as to petitioner.

Petitioner suggest that the Court of Appeals failed to determine petitioner's entitlement to proceed to trial with respect to his allegations against certain respondents of violations of his Civil Rights.

After the February 1974 interpleader trial, which had evidenced that petitioner was the victim of the fraud perpetrated upon him, and that the injunctive order was fraudulently obtained by Electro, May 22, 1969, supra, as shown by the evidence and facts in the transcript of the record at pages 1 and 54, the trial judge granted petitioner's counsel leave to amend the complaint in *Oppenheimer* v. *Electro-Nucleonics, Inc., et al.*, 70 Civ. 5667, supra, except as to Electro, the subject of the original appeal, supra. The amended complaint alleged violations of 28 U.S.C. 1343 (Civil Rights) by Electro and respondents Conboy, Hewitt, O'Brien and Boardman, Alfred S. Berg and Harold Wm. Harrison, plus updating the original allegations of fraud and violations of federal securities law by defendants.

Petitioner would argue that the Court of Appeals made no determination of the Civil Rights allega-

tions, which remains undecided, and, the order of the Court of Appeals, page 2, states:

> "Appellant challenges the dismissal of his action as against defendants Peat, Marwick and Mitchell & Co., Sterling, Grace Securities Corporation, and other defendants who participated in the filing of a Registration Statement with the Securities and Exchange Commission in 1969 for Electro-Nucleonics. The district judge justifiably found that appellant neither alleged nor proved that he either purchased or sold any of Electro's securities covered by that Registration Statement, and thus, for that reason among others, his claims under the securities laws fail."

IV

Finally, petitioner would show that the trials in these consolidated actions, were conducted with petitioner in restraint, that the trial judge in these consolidated actions, had enjoined petitioner in both the February, 1974 and December 30, 1975 trials which hindered petitioner from introducing the preponderance of evidence against defendants, and, that the petitioner, unable to subpeona default defendant Rodriquez,[1]/ resulted in the dismissal, after trial of respondents Bernardini and Cabrera. This restraint imposed by the court on petitioner, deprived him of the consti-

[1]/ Rodriquez was a defendant in the same jurisdiction, in a tax matter (unrelated to these actions) which was scheduled for trial, shortly after the December 30, 1975 trial. Petitioner's counsel urged the trial judge to permit this defendant to testify, which was denied by the court.

tutionally required rights to a fair trial with respect to due process, pursuant to the 5th Amendment to the U.S. Constitution.

Thus, the Court of Appeals affirmance of the trial court's findings that "appellant had failed to sustain his burden of proof of showing actionable fraud by these defendants against appellant, is not clearly erroneous." (The Court of Appeals order, page 2), the Court did not take into account that petitioner was enjoined from having any witnesses appear on his behalf, supra, and the only way to "sustain the burden" was to have testimony and documents at the trial, which would and could have further evidenced the entire fraud, conspiracy perpetrated upon petitioner by all the defendants, as alleged in petitioner's amended complaints.

REASONS FOR GRANTING WRIT

As cause for granting this Writ of Certiorari, your petitioner would show:

1. The Court of Appeals in not making any determination of petitioner's entitlement to a forum as mandated in the May 22, 1969 order, supra, contravenes Title 28, U.S.C. 1355 (a) (2), that, the decree is interlocutory and not final.

2. That the Court of Appeals has sanctioned a lower court's findings which was not on the trial record or in any part of the record, at anytime, with respect to valuation of the Electro stock on February 23, 1968, and that the record is clear and uncontroverted with respect to an award of damages and interest either on July 15, 1968, and/or April 15, 1969, for petitioner.

3. The petitioner is entitled to a trial against respondents as alleged in his amended complaint of violations of petitioner's Civil Rights, that the Court of Appeals made no determination with respect to that part of his petition and violates petitioner's rights under Title 28, U.S.C. 1343.

4. That the petitioner was deprived of a fair trial in February, 1974 and December, 1975, by enjoining petitioner from having any witnesses appear on his behalf at trial, that the Court of Appeals ruling upholding the dismissal of the complaint as against Bernardini and Cabrera, violated petitioner's rights under the 5th Amendment-due process of law.

WHEREFORE, your petitioner, NORMAN B. OPPENHEIMER, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in the above-captioned cause.

Respectfully submitted,

NORMAN B. OPPENHEIMER, pro se

NORMAN B. OPPENHEIMER, pro se
Petitioner
1551 Second Avenue
New York, New York 10028
Phone: 212-799-9680

STATE OF NEW YORK
COUNTY OF NEW YORK

GUILLERMO SEGARRA, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 448 Bolton Avenue, Bronx, New York 10473.

That, on the 17th day of September 1979, deponent served the within Petition for Writ of Certiorari, upon the parties or attorneys of record herein by depositing the same in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed, as follows:

Berg & Duffy
300 Marcus Avenue
Lake Success, New York 11042

Attorneys for Respondents

ELECTRO-NUCLEONICS, INC.,
BERTHA L. BERG, EXECUTRIX

For THE ESTATE OF ALFRED S. BERG

AVELINO FIEL, pro se
24-14 East 12th Street
Brooklyn, New York

D'Amato, Costello & Shea
116 John Street
New York, New York 10038

Attorneys for Respondents
CONBOY, HEWITT O'BRIEN & BOARDMAN

HAROLD WM. HARRISON, pro se
10 Grace Ave.
Great Neck, New York

FRED J. HALSEY, JR.
213 East 49th Street
New York, New York 10017

Attorney for Respondents
HERBIERTO FEBUS BERNARDINI
MARIANO CABRERA

DATED: NEW YORK, NEW YORK
1979

Sworn to before me this date

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of April, one thousand nine hundred and seventy-nine.

Present:

HONORABLE LEONARD P. MOORE
HONORABLE WILFRED FEINBERG
HONORABLE THOMAS J. MESKILL

Circuit Judges,
NORMAN B. OPPENHEIMER,
Plaintiff-Appellant,

—against—

ELECTRO-NUCLEONICS, INC., et al.
Defendants-Appellees.

ELECTRO-NUCLEONICS, INC.,
Plaintiff,

—against—

NORMAN OPPENHEIMER, et al.,
Defendants.

Appeals from the United States District Court for the Southern District of New York

---

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

This is an appeal by plaintiff from a judgment in plaintiff's favor of approximately $109,000 against four defendants, entered by Judge Constance Baker Motley in the United States District Court for the Southern District of New York. The action was dismissed as against numerous other defendants. Judge Motley wrote three opinions, dated June 21, 1974, July 31, 1975 and September 15, 1976. Appellant challenges the dismissals and also claims that the amount of the judgment obtained is too small.

The case has its origin in a 1965 lease transaction in Puerto Rico, wherein appellant endorsed a warrant for the purchase of Electro-Nucleonics, Inc. stock in blank and delivered it as security. His signature was not guaranteed by a bank, however, which appellant knew was required for effective transfer, as Judge Motley found. After the lease transaction soured, appellant sought to get the warrant back, but it had already been delivered to one Fiel, a defendant in this action. When both appellant and Fiel sought to exercise the warrant, Electro-Nucleonics brought the instant interpleader action, which was subsequently

consolidated with an action brought by appellant concerning the same subject matter.

Appellant challenges the dismissal of his action as against defendants Peat, Marwick and Mitchell & Co., Sterling, Grace Securities Corporation, and other defendants who participated in the filing of a Registration Statement with the Securities and Exchange Commission in 1969 for Electro-Nucleonics. The district judge justifiably found that appellant neither alleged nor proved that he either purchased or sold any of Electro's securities covered by that Registration Statement, and thus, for that reason among others, his claims under the securities laws fail.

Appellant challenges the vacatur of default judgments that had been entered against defendants Mariano J. Cabrera and H. Febus Bernardini, and the dismissal of the complaint as against them. We find no abuse of discretion in Judge Motley's vacatur of the default judgments, and also hold that the district court's finding, that appellant had failed to sustain his burden of proof of showing actionable fraud by these defendants against appellant, is not clearly erroneous.

Appellant argues that the amount of the judgment entered in his favor against four of the defendants is too low, and that the amount should have been approximately $243,000, allegedly the highest value of the stock subject to the warrant between the time of issuance of the warrant and the time appellant ultimately re-obtained the warrant when he won the interpleader action. We agree with the district judge that to enter judgment in that amount on these facts would be too speculative, and we hold that the finding of damages in the amount of approximately $109,000 ($25,000 of which is in the nature of punitive damages) is not

clearly erroneous, nor indeed ungenerous. The district judge pointed out that if plaintiff could in fact have realized a greater amount from the warrant, had it not been tied up in litigation, he caused much of the difficulty himself by dealing with the warrant in the lease transaction in such a way as to create the confusion that resulted in all the litigation that then inevitably followed.

Appellant has raised other issues, which we find upon due consideration to be without merit. We affirm the judgment of the district court in all respects.

LEONARD P. MOORE

WILFRED FEINBERG

THOMAS A. MESKILL

Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Judgment #78,1252

ELECTRO-NUCLEONICS, INC., Plaintiff

69 Civ. 1616 (CBM)

versus

NORMAN OPPENHEIMER, AVELINO FIEL, MARIANO CABRERA, CESAR J. FEBUS BERNARDINI, and MADRID HOTEL CORPORATION, Defendants

NORMAN B. OPPENHEIMER, Plaintiff

70 Civ. 5667 (CBM)

versus

ELECTRO-NUCLEONICS, INC., REGISTRAR and TRANSFER AGENT OF NEW JERSEY, BERTHA L. BERG AS EXECUTRIX OF THE ESTATE OF ALFRED S. BERG, DECEASED, HAROLD WM. HARRISON, BENJAMIN RODRIQUEZ, HERBIERTO FEBUS BERNARDINI, MADRID HOTEL CORPORATION, MARIANO CABRERA, CESAR FEBUS BERNARDINI, AVELINO FIEL, JOHN J. NEWGARD, RICHARD ABAJIAN, VINCENT ABAJIAN, DR. JOHN O. HERSHEY, ROY B. SNAPP, RAY A. KROC, WALTER M. CAROW, PEAT, MARWICK AND MITCHELL AND CO., STERLING GRACE SECURITIES CORPORATION, AND CONBOY, HEWITT, O'BRIEN and BOARDMAN, A PARTNERSHIP, Defendants

The above entitled actions having been consolidated by the Order of the Court of Appeals for the Second Circuit, filed November 12, 1974, so ordered, by Honorable Constance Baker Motley, United States District Judge, dated December 16, 1974, filed December 17, 1974, (EXHIBIT "A"), and it was

Decided that plaintiff ELECTRO-NUCLEONICS, INC. in 69 Civ. 1616 was discharged from any and all further liability, except to the party who the Court shall adjudge is entitled to exercise Warrant No. W104, dated and so ordered by Honorable Charles M. Metzner, United States District Judge, May 13, 1969 (EXHIBIT "B"), and it was

Decided that the complaint of plaintiff NORMAN B. OPPENHEIMER, in 70 Civ. 5667, as against defendants ELECTRO-NUCLEONICS, INC., and REGISTRAR AND TRANSFER AGENT OF NEW JERSEY, was dismissed by Honorable Marvin E. Frankel, United States District Judge, dated and so ordered March 15, 1971 (EXHIBIT "C") and it was decided

After a non-jury trial which was held on February 4th and 5th, 1974 in the 69 Civ. 1616 before Honorable Constance Baker Motley, defendants NORMAN OPPENHEIMER and AVELINO FIEL appearing, no other defendants appearing, after trial, the Court adjudged defendant NORMAN OPPENHEIMER was the rightful owner of the common stock purchase Warrant No W104 and had the right to exercise same for the purchase of the common stock of plaintiff ELECTRO-NUCLEONICS, INC. dated and so ordered, June 21, 1974 (EXHIBIT "D") and

The Court decreed that defendant NORMAN OPPENHEIMER was entitled to the possession of 6,750 shares of common stock of plaintiff ELECTRO-NUCLEONICS, INC., defendant AVELINO FIEL was not entitled to any part of the 6,750 shares of stock now declared owned by NORMAN OPPENHEIMER, and, AVELINO FIEL was directed to surrender to plaintiff ELECTRO-NUCLEONICS, INC. 4,500 shares of common stock of ELECTRO-NUCLEONICS, INC. for

cancellation, and, plaintiff ELECTRO-NUCLEONICS, was directed to return to AVELINO FIEL all moneys tendered by him in the exercise of WARRANT NO. W104, and subject to collection of a check given in payment by defendant NORMAN OPPENHEIMER to ELECTRO-NUCLEONICS, INC. shall then issue and deliver to defendant NORMAN OPPENHEIMER, 6,750 shares of common stock of ELECTRO-NUCLEONICS, INC., dated and so ordered June 21, 1974 (EXHIBIT "E"), and it was

Previously decided that plaintiff NORMAN B. OPPENHEIMER in 70 Civ. 5667 was granted leave to file and serve an amended complaint except as to defendants ELECTRO-NUCLEONICS, INC. and REGISTRAR AND TRANSFER AGENT OF NEW JERSEY, dated and so ordered August 27, 1974 (EXHIBIT "F"), thereafter

In the above consolidated actions, the Honorable Constance Baker Motley, decreed to dismiss the complaint and for summary judgment of defendants PEAT MARWICK AND MITCHELL AND CO., STERLING GRACE SECURITIES CORPORATION, CONBOY, HEWITT, O'BRIEN and BOARDMAN, A PARTNERSHIP, HAROLD WM. HARRISON, BERTHA L. BERG AS EXECUTRIX OF THE ESTATE OF ALFRED S. BERG, DECEASED, JOHN J. NEWGARD, RICHARD ABAJIAN, VINCENT ABAJIAN, JOHN O. HERSHEY, ROY B. SNAPP AND WALTER M. CAROW, dated and so ordered July 31, 1975, filed October 28, 1975 (EXHIBIT "G"), and

On December 30, 1975, a one day trial was held in these two consolidated actions, without a jury, counsel appearing for NORMAN B. OPPENHEIMER, and counsels for defendants AVELINO FIEL, HERB-

IERTO FEBUS BERNARDINI and MARIANO CABRERA argued and the remaining party defendants BENJAMIN RODRIQUEZ, MADRID HOTEL CORPORATION and CESAR FEBUS BERNARDINI did not appear before Honorable Constance Baker Motley, default judgment previously was entered as against them on November 15, 1974, after trial, decision was reserved, thereafter, findings of fact and conclusions of law dated and so ordered September 15, 1976, (EXHIBIT "H") and

It was decreed that these two consolidated actions be discontinued, dated and so ordered September 17, 1976, filed September 22, 1976, (EXHIBIT "I") thereafter

Plaintiff Norman B. Oppenheimer motion to amend the findings of fact and conclusions of law, September 15, 1976, denied, dated and so ordered May 10, 1978, (EXHIBIT "J")

That, defendant RAY A. KROC, in these consolidated actions by motion to dismiss complaint, granted, dated and so ordered May 12, 1978, filed May 16, 1978, therefore

Upon the findings of fact and conclusions of law, dated and so ordered September 15, 1976, it is

ORDERED ADJUDGED and DECREED that the Order of discontinuance signed by Honorable Constance Baker Motley, of September 17, 1976, filed September 22, 1976 is hereby vacated, and it is further

ORDERED ADJUDGED and DECREED that the plaintiff's NORMAN B. OPPENHEIMER complaint in these two consolidated actions against defendants HERBIERTO FEBUS BERNARDINI and MARIIANO CABRERA are dismissed, and that they have judgment against plaintiff NORMAN B. OPPENHEIMER dismissing the complaint, and it is further

ORDERED ADJUDGED and DECREED that plaintiff NORMAN B. OPPENHEIMER is awarded damages determined as on February 23, 1968, in the amount of $109,125.00. deducting $25,000.00, totaling $84,125.00, against defendants AVELINO FIEL, BENJAMIN RODRIQUEZ, CESAR FEBUS BERNARDINI and MADRID HOTEL CORPORATION, jointly and severally, and it is further

ORDERED ADJUDGED and DECREED that plaintiff NORMAN B. OPPENHEIMER is awarded punitive damages in the amount of $25,000.00, against defendants AVELINO FIEL, BENJAMIN RODRIQUEZ, CESAR FEBUS BERNARDINI and MADRID HOTEL CORPORATION, jointly and severally, and it is further

ORDERED ADJUDGED and DECREED that plaintiff NORMAN B. OPPENHEIMER is entitled to the taxable costs against defendants AVELINO FIEL, BENJAMIN RODRIQUEZ, CESAR FEBUS BERNARDINI and MADRID HOTEL CORPORATION, jointly and severally.

Dated September 13, 1978

New York, New York

CONSTANCE BAKER MOTLEY
UNITED STATES
DISTRICT JUDGE

Judgment Entered
September 13, 1978

CLERK OF THE COURT

Supreme Court, U. S.
FILED
OCT 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

Docket No. 79-469

NORMAN B. OPPENHEIMER,

Petitioner,

versus

ELECTRO-NUCLEONICS, INC., AVELINO FIEL, Estate of ALFRED BERG, Deceased, BERTHA L. BERG as Executrix, HAROLD WM. HARRISON, HERBIERTO FEBUS BERNARDINI, MARIANO CABRERA, CONBOY, HEWITT, O'BRIEN AND BOARDMAN, ESQS., a Partnership,

Respondents.

BRIEF OF RESPONDENTS ELECTRO-NUCLEONICS, INC., AND BERTHA L. BERG AS EXECUTRIX OF THE ESTATE OF ALFRED S. BERG, DECEASED, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

BERG AND DUFFY
Attorneys for Respondents
Electro-Nucleonics, Inc., and
Bertha L. Berg, as Executrix of the
Estate of Alfred S. Berg, Deceased
3000 Marcus Avenue
Lake Success, New York 11042
(516) 354-2500

JAMES P. DUFFY, III
WILLIAM CORNACHIO
Of Counsel

[*Further Counsel Listed on Inside Cover*]

AVELINO FIEL, *pro se*
24-14 East 12th Street
Brooklyn, New York 11201

D'AMATO & LYNCH
70 Pine Street
New York, New York 10005
Attorneys for Respondents
Conboy, Hewitt, O'Brien & Boardman, Esqs.

HAROLD WM. HARRISON, *pro se*
10 Grace Avenue
Great Neck, New York 11022

FRED J. HALSEY, JR.
213 East 49th Street
New York, New York 10017
Attorney for Respondents
Herbierto Febus Bernardini
and Mariano Cabrera

TABLE OF CONTENTS

PAGE

Opinions Below 1

Questions Presented 2

Rule Involved 2

Counter-Statement of the Facts 2

Argument

Point I—The decision below is in accord with applicable state law 3

Point II—No important questions of federal law are raised in the petition, and the result below is consistent with decisions of this Court and other U.S. Courts of Appeals 4

Point III—There has been no departure from the usual course of accepted judicial proceedings 5

Conclusion 7

TABLE OF AUTHORITIES

Cases Cited:

Blue Chip Stamps *et al.* v. Manor Drug Stores, 421 U.S. 723 (1975) 4

Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2nd Cir. 1952), *cert. den'd,* 343 U.S. 956 (1952) 4

Cory Corp. v. Sauber, 363 U.S. 709 (1960) 6

Statutes Cited:

Uniform Commercial Code §8-311 3

Uniform Commercial Code §8-403(c) 4

Rule Cited:

Fed.R.Civ.P. 22 5

Authority Cited:

New Jersey Study Comment No. 4 to N.J.S.A. §12A:8-403 5

IN THE

Supreme Court of the United States

October Term, 1979

Docket No. 79-469

NORMAN B. OPPENHEIMER,

Petitioner,

versus

ELECTRO-NUCLEONICS, INC., AVELINO FIEL, Estate of ALFRED BERG, Deceased, BERTHA L. BERG as Executrix, HAROLD WM. HARRISON, HERBIERTO FEBUS BERNARDINI, MARIANO CABRERA, CONBOY, HEWITT, O'BRIEN AND BOARDMAN, ESQS., a Partnership,

Respondents.

BRIEF OF RESPONDENTS ELECTRO-NUCLEONICS, INC., AND BERTHA L. BERG AS EXECUTRIX OF THE ESTATE OF ALFRED S. BERG, DECEASED, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, and the judgment of the United States District Court for the Southern District of New York are annexed to Petitioner's Writ of Certiorari as Appendix A and Appendix B, respectively.

Questions Presented

(1) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the questions decided below are in accord with decisions of this Court?

(2) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the questions decided below are in accord with state law?

(3) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the questions decided below are not in conflict with decisions of other Courts of Appeals on the same subject?

(4) Whether the United States Supreme Court should exercise its discretion in granting a Writ of Certiorari when the proceedings below were conducted in accordance with the Federal Rules of Civil Procedure?

Rule Involved

U.S. Sup. Ct. Rule 19, 28 U.S.C.A.

Counter-Statement of the Facts

The facts, in so far as they are relevant, are succinctly set forth in the decision appealed from. Accordingly, we disagree largely with Petitioner's statement of facts. Yet, we will, for the most part, allow Petitioner these indiscretions.

However, the discussion on pages 6 and 7 of Petitioner's statement of facts with respect to the ultimate disposition of the shares represented by Warrant No. W-104 (the "warrant") must be corrected. In September, 1974, at the conclusion of the interpleader action, Petitioner received all the shares issuable upon the exercise of the warrant and promptly sold them (A383).* In sharp contrast to the conspiracy alleged in Petitioner's statement of facts, his own trial testimony unequivocally states that he had no evidence that any defendant, other than Rodriquez, had contact with defendant Fiel (A392).

ARGUMENT

POINT I

The decision below is in accord with applicable state law.

The District Court found, on the basis of the evidence produced at the trial of the interpleader action, that Petitioner personally endorsed the warrant, thereby placing it into the stream of commerce essentially in bearer form (A278). In accordance with Uniform Commercial Code §8-311, Petitioner is estopped from asserting the ineffectiveness of his assignment.

Petitioner contends that Electro-Nucleonics, Inc. ("Electro"), acted improperly in failing to recognize his ownership under the decree of the Puerto Rican court. In

* References preceded by "A" refer to the appendix filed in the recent appeal to the Second Circuit, 78-7497. References preceded by "R" refer to the appendix filed in Petitioner's earlier appeal under File No. 74-2222.

making a most elementary business judgment, Electro recognized that Fiel, the party presenting the warrant, was not a party to the Puerto Rican action. Moreover, Uniform Commercial Code §8-403(c) states "the issuer is *not* charged with notice of the contents of any court record or file . . ." [Emphasis added].*

POINT II

No important questions of federal law are raised in the petition, and the result below is consistent with decisions of this Court and other U.S. Courts of Appeals.

The District Court found that Petitioner had neither proved nor alleged a sale of securities in reliance upon Electro's Registration Statement. Accordingly, his allegations of securities law violations fail based upon this Court's opinion in *Blue Chip Stamps, et al.* v. *Manor Drug Stores,* 421 U.S. 723 (1975), and that of the Second Circuit in *Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461 (2nd Cir. 1952), *cert. den'd,* 343 U.S. 956 (1952).

Petitioner contends that Electro's interpleader action, as a part of the ever-widening conspiracy he imagines, constituted some unspecified violation of his civil rights. Yet, as Petitioner's own record discloses, Electro was threatened with litigation if Fiel's exercise of the warrant was not honored (A322). In such situations, Electro's right to institute the interpleader action, and require Petitioner and Fiel to litigate their claims among themselves, is overwhelmingly supported by local and Federal law. Fed.R.Civ.P. 22 (see also New Jersey Study Comment No. 4 to N.J.S.A. §12A:8-403). The District Court's finding that the bringing of this action was proper and in accordance with applicable law (A277) was affirmed by the Court of Appeals.

* See also Judge Canella's order dated March 31, 1970, denying Petitioner's motion for summary judgment (A120-127).

Upon deposit of the warrant into court, Electro-Nucleonics was discharged from all liability except to the party whom the court adjudged was entitled to execute it (R94). In accordance with that decree, at the conclusion of the interpleader action, all the shares to which Petitioner was entitled upon exercise of the warrant were delivered to him. He shortly thereafter sold them (A383).

POINT III

There has been no departure from the usual course of accepted judicial proceedings.

The petition is largely centered upon an alleged departure from the course of accepted judicial proceedings. As an example, Petitioner now contends that he was enjoined from serving subpoenas on witnesses proposed to appear on his behalf at trial.* It is clear that Petitioner's own conduct—his repeated violations of the interpleader order—caused these restrictions (R63). It was Petitioner's abuse of process which caused Judge Lasker, in his July 24, 1972 memorandum decision, to observe:

> "In view of the history of Oppenheimer's harassing tactics, he is ordered not to make any further motions in this action prior to trial without the express ap-

* The injunction was not as severe as Petitioner may lead one to believe (R62; R94; A152), and was lifted after trial of the interpleader.

proval of the court. The instant motions, as the other judges of this court have observed as to prior motions, are an intolerable abuse of the court's process and a waste of judicial resources." (R267-268).

The record below amply discloses that Petitioner, who often proceeded *pro se,* was offered every conceivable indulgence by the many judges who presided over the numerous proceedings which he had brought.

In over ten years of litigation, Petitioner has appeared on motions before five District Court judges, and, on trial, before a sixth, who all recognized that his damages were inflicted by no one except himself and those individuals associated with the abortive Puerto Rican lease transaction. Typical of these findings is Judge Motley's statement that:

> "As the record discloses, Oppenheimer, who was then representing himself, sought unsuccessfully on several occasions to set aside Judge Metzner's order, thus delaying prompt disposition of the interpleader action (A274) . . . Had plaintiff not impeded the progress of the interpleader action by repeatedly seeking to set aside Judge Metzner's order, he might have been able to secure title and possession of the warrant earlier." (A279).

Petitioner had appealed virtually every ruling of the Southern District which was adverse to him; yet the Second Circuit unanimously affirmed. Even if it could be assumed that all these decisions were wrong, there was not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Cory Corp.* v. *Sauber,* 363 U.S. 709, 713 (1960).

Conclusion

Petitioner fails to present a question of federal or state law appropriate for consideration by this Court. Accordingly, this petition for Writ of Certiorari should be denied.

Respectfully submitted,

BERG AND DUFFY
Attorneys for Respondents
Electro-Nucleonics, Inc., and
Bertha L. Berg, as Executrix of the
Estate of Alfred S. Berg, Deceased
3000 Marcus Avenue
Lake Success, New York 11042
(516) 354-2500

JAMES P. DUFFY, III
WILLIAM CORNACHIO
Of Counsel

AVELINO FIEL, *pro se*
24-14 East 12th Street
Brooklyn, New York 11201

D'AMATO & LYNCH
70 Pine Street
New York, New York 10005
Attorneys for Respondents
Conboy, Hewitt, O'Brien & Boardman, Esqs.

HAROLD WM. HARRISON, *pro se*
10 Grace Avenue
Great Neck, New York 11022

FRED J. HALSEY, JR.
213 East 49th Street
New York, New York 10017
Attorney for Respondents
Herbierto Febus Bernardini
and Mariano Cabrera

Supreme Court, U. S.
FILED
NOV 13 1979

IN THE

Supreme Court of the United States

Docket No. 79-469

NORMAN B. OPPENHEIMER,

Petitioner,

versus

ELECTRO-NUCLEONICS, INC., AVELINO FIEL, Estate of ALFRED BERG, Deceased, BERTHA L. BERG as Executrix, HAROLD WM. HARRISON, HERBIERTO FEBUS BERNARDINI, MARIANO CABRERA, CONBOY, HEWITT, O'BRIEN AND BOARDMAN, ESQS., a Partnership,

Respondents.

BRIEF OF RESPONDENTS CONBOY, HEWITT, O'BRIEN & BOARDMAN, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD G. McGAHREN
70 Pine Street
New York, New York 10005
Counsel for Respondents
Conboy, Hewitt, O'Brien & Boardman

KENNETH A. SAGAT
D'AMATO & LYNCH
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Denying the Writ	8
Conclusion	12

Table Of Authorities

Birnbaum v. *Newport Steel Corp.*, 193 F.2d 461, *cert. denied*, 313 U.S. 956 (1952)	8
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	8
Collins v. *Hardyman*, 341 U.S. 651 (1951)	10
Dillard v. *Family Court, Queens County*, 404 F.2d 404 (2nd Cir. 1968)	10
Duffy v. *Ranger Securities Corp.*, 346 F.Supp. 1401 (E.D.N.Y. 1972)	8
Eisen v. *Eastman*, 421 F.2d 560 (2nd Cir. 1969)	10
Israel v. *Wood Dolson Co., Inc.*, 1 N.Y.2d 116 (1956)	11
Johnson v. *Dailey*, 479 F.2d 86 (8th Cir. 1976)	11
Johnston v. *National Broadcasting Co., Inc.*, 356 F. Supp. 904 (E.D.N.Y. 1973)	10
Kellman v. *ICS Inc.*, 447 F.2d 1305 (6th Cir. 1971)	9
Klein v. *Spear, Leeds & Kellogg*, 306 F.Supp. 743 (S.D.N.Y. 1969) and 309 F.Supp. 341 (S.D.N.Y. 1970)	8

PAGE

Koll v. *Wayzata State Bank*, 397 F.2d 124 (8th Cir. 1968) 10

McCall v. *Shapiro*, 416 F.2d 246 (2nd Cir. 1969) 10

McManigal v. *Simon*, 382 F.2d 408 (7th Cir. 1967) 10

Ream v. *Handley*, 359 F.2d 728 (7th Cir. 1966) 10

Romer v. *Leary*, 425 F.2d 186 (2nd Cir. 1970) 10

Stampinato v. *M. Breger & Co., Inc.*, 270 F.2d 46 (2nd Cir. 1959) 8

Stirling v. *Chemical Bank*, 382 F.Supp. 1146 (S.D.N.Y. 1970), *aff'd* 516 F.2d 1396 (2d Cir. 1975) 8

Wallach v. *Cannon*, 357 F.2d 557 (8th Cir. 1966) 10

Zdanok v. *Glidden Co., Durkee Famous Foods Division*, 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 11

Statutes and Rules

Securities Act of 1933 §17(a) 2, 8

Securities Exchange Act of 1934 §10(b) 2, 8

28 U.S.C. 1343 ..... 9, 10

42 U.S.C. 1985 9

Federal Rules of Civil Procedure

Rule 12(b)(6) 6

Rule 56 6

IN THE

Supreme Court of the United States

Docket No. 79-469

NORMAN B. OPPENHEIMER,

Petitioner,

versus

ELECTRO-NUCLEONICS, INC., AVELINO FIEL, Estate of ALFRED BERG, Deceased, BERTHA L. BERG as Executrix, HAROLD WM. HARRISON, HERBIERTO FEBUS BERNARDINI, MARIANO CABRERA, CONBOY, HEWITT, O'BRIEN AND BOARDMAN, ESQS., a Partnership,

Respondents.

BRIEF OF RESPONDENTS CONBOY, HEWITT, O'BRIEN & BOARDMAN, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, and the judgment of the United States District Court for the Southern District of New York are annexed to Petitioner's Writ of Certiorari as Appendix A and Appendix B, respectively.

STATUTES INVOLVED

The pertinent statutory provisions are §17(a) of the Securities Act of 1933, 15 U.S.C. §77Q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78J(b); 28 U.S.C. 1343; 42 U.S.C. 1985.

QUESTIONS PRESENTED

(1) Whether petitioner's complaint failed to state a claim upon which relief may be granted?

(2) Whether petitioner was barred from bringing this action under the traditional principles of *res judicata* and collateral estoppel?

STATEMENT OF THE CASE

This action has a long history dating back to 1969. Respondent Conboy, Hewitt, O'Brien & Boardman ("Conboy, Hewitt"), a firm of attorneys, first became involved in this litigation as a result of its service of an interpleader complaint, on behalf of its client Electro-Nucleonics, Inc. ("Electro") in Civil Action File No. 69 Civ. 1616. An outline of the history of this action will demonstate that there has been no departure from accepted judicial proceedings.

In 1963, Electro, as an incident to a public offering of its securities, caused a common stock purchase warrant, No. W104, to be issued, authorizing petitioner, Norman B. Oppenheimer ("Oppenheimer"), or his registered assignees, to purchase 2,250 shares of common stock of Electro at a purchase price of $5.00 per share.

Thereafter Electro was presented with conflicting claims as to the ownership of the warrant. Oppenheimer requested that Electro allow him to exercise the warrant and he forwarded a check in the amount of $11,250. Respondent Avelino Fiel ("Fiel"), likewise attempted to exercise the warrant and claimed that said warrant had been assigned to him in blank and made bearer in nature by Oppenheimer. Fiel also forwarded a check in the amount of $11,250 to Electro.

By order of the Hon. Milton Pollack dated April 23, 1969, on motion of Conboy, Hewitt, on behalf of Electro, permission was granted to Electro to serve a summons and interpleader complaint on Oppenheimer, Fiel, Mariano Cabrera, Cesar J. Febus Bernardini and Madrid Hotel Corporation. It was likewise ordered, *inter alia,* that the warrant, the ownership of which was a matter of dispute, and which was previously deposited in the Registry of the Court by Electro, be retained therein pending determination of the proceeding. Oppenheimer and Fiel were enjoined, by that order from instituting or prosecuting any suit or proceeding against Electro on account of the warrant until the further order of the Court. Oppenheimer and Fiel were ordered to show cause why Electro should not be discharged from liability except as to the party the Court should adjudge entitled to exercise the warrant, and to show cause why the injunction against them should not be made permanent. (A 3)*

By Order of the Hon. Charles M. Metzner dated May 13, 1969, Electro was discharged from any and all further liability except as to the party the court should adjudge en-

*Reference preceded by "A" refer to respondent Conboy, Hewitt's Appendix and references preceded by "AA" refer to petitioner's Appendix both filed in the recent appeal to the Court of Appeals for the Second Circuit, 78-7497.

titled to exercise the warrant. (A 15) Fiel was enjoined from transferring or hypothecating 4,500 shares of Electro in his possession, and Oppenheimer and Fiel were permanently enjoined from suing Electro on account of said warrant. The 4,500 shares then held by Fiel had been inadvertently issued to him in connection with a stock split. These facts were disclosed in paragraph 21 of the interpleader complaint. No appeal was ever taken from this order.

Thereafter, on four separate occasions, Oppenheimer attempted to vacate Judge Metzner's order. All of these motions were denied and resulted in the order of the Hon. Morris Lasker which stated in part that,

> "In view of the history of Oppenheimer's harassing tactics he is ordered not to make any further motions in this action prior to trial without the express approval of the Court. The instant motions as the other judges of this Court have observed as to prior motions, are an intolerable abuse of the Court's process and a waste of judicial resources—at a time when the courts are already over burdened by important issues of the day the disposition of which is delayed by frivolous litigation such as this."

A trial was held on the interpleader action and a final decree dated June 21, 1974 by Judge Motley held that as between Oppenheimer and Fiel, Oppenheimer was entitled to possession of the shares underlying the warrant. Judge Motley's Memorandum Opinion and Order (A 29) held that Fiel was liable to Oppenheimer for any damages which Oppenheimer could prove he suffered as a result of Fiel's actions in helping to deprive Oppenheimer of his right to exercise the warrant. The Court stated that the issue of damages as to Fiel would be tried during the trial of the

instant case (70 Civ. 5667) and noted that "Oppenheimer may also be entitled to costs and counsel fees as against Fiel and/or others to be determined at the trial of 70 Civ. 5667 upon a showing of bad faith." (A 41)

Oppenheimer moved on May 1, 1974 to amend his complaint, and on or about September 3, 1974, Conboy, Hewitt was served with the amended complaint in the instant action. Several other defendants were added in that amended complaint. Oppenheimer was permitted to serve the amended complaint upon a number of defendants in the action, but the Court denied his right to serve the amended complaint upon Electro and Registrar and Transfer Company. Oppenheimer appealed from so much of the order as denied his motion to serve the amended complaint upon Electro and Registrar and Transfer Company and a motion to dismiss that appeal was granted by an order of the Court of Appeals for the Second Circuit. That order also directed consolidation of the two actions.

On or about October 17, 1974, Conboy, Hewitt was served with the second amended complaint in this action. The complaints against Conboy, Hewitt alleged that Conboy, Hewitt brought an action in interpleader on behalf of their client, Electro, as part of a conspiracy to deprive Oppenheimer of his rightful possession of the warrant in question. Whether the bringing of the interpleader action was in any way part of a scheme had already been decided in a prior decision on November 30, 1970 wherein it was stated, ". . . Under the circumstances, [Electro] was fully justified in bringing this interpleader suit wherein the injunction was granted." (A 1)

The complaints against Conboy, Hewitt also claimed that as part of the alleged conspiracy and scheme, Conboy, Hewitt caused a false and misleading registration state-

ment to be filed with the Securities and Exchange Commission on behalf of Electro. It is sufficient to point out that nowhere in the complaints did Oppenheimer allege that he purchased or sold any securities as a result of the allegedly false or misleading registration statement or other documents filed with the Securities and Exchange Commission. Indeed, the complaint shows that the warrant in question was issued to Oppenheimer on June 29, 1965 and that he attempted to exercise it on February 12, 1968, before the registration statement was filed. In the meantime he gave up possession of it to a third party with the result that adverse ownership claims were made on the warrant.

Conboy, Hewitt moved to dismiss the second amended complaint pursuant to Rule 12(b)(6) F.R.C.P. and for summary judgment pursuant to Rule 56 F.R.C.P. In a decision filed August 15, 1975, Judge Motley granted summary judgment in favor of Conboy, Hewitt, finding that not only did Oppenheimer fail to allege a purchase or sale of securities but Oppenheimer also failed "to satisfy the requirements that these defendants knew at the time the registration statement was filed that the information contained therein was false and contained material misleading information." (AA 279) The Court concluded that "[N]either plaintiff's complaint nor his amended complaints factually support claims of such requisite knowledge or intent to defraud with respect to any of the above defendants either individually or as part of a conspiratorial scheme." (AA 281) The Court further noted that "[P]laintiff never alleged that he was *harmed* by any misrepresentation or omission in connection with the purchase or sale of such securities; he merely states the dispute as to ownership was erroneously not

included in the registration statement." (AA 280) Oppenheimer appealed that decision and then moved to withdraw that appeal. The Court of Appeals permitted Oppenheimer to withdraw that appeal without prejudice to filing a notice of appeal after a final determination of all pending proceedings in the court below. (AA 290)

On December 30, 1975, trial was held in the two consolidated actions. Counsel for Oppenheimer and counsel for defendants Fiel, Herbierto Febus Bernardini and Mariano Cabrera appeared and argued and the remaining party defendants Benjamin Rodriguez, Madrid Hotel Corporation and Cesar Febus Bernardini did not appear. A default judgment had previously been entered against the last three defendants on November 15, 1974. After trial, decision was reserved. Thereafter, findings of fact and conclusion of law were made and an order was entered on September 15, 1976 discontinuing the two consolidated actions. (AA 70) Oppenheimer then moved to amend the findings of fact and conclusions of law. This was denied in an order dated May 10, 1978.

By an order entered September 13, 1978, Judge Motley awarded judgment to Oppenheimer against defendants Fiel, Benjamin Rodriguez, Cesar Febus Bernardini and Madrid Hotel Corporation and dismissed Oppenheimer's complaint against defendants Herbierto Febus Bernardini and Mariano Cabrera. That order cited the previous decree of Judge Motley dismissing the second amended complaint as against Conboy, Hewitt. (AA 19)

Oppenheimer appealed from Judge Motley's final judgment dated October 28, 1975, awarding summary judgment to defendant Conboy, Hewitt, among others. The Court of Appeals for the Second Circuit unanimously affirmed the final judgment in all respects.

REASONS FOR DENYING THE WRIT AS TO RESPONDENTS CONBOY, HEWITT, O'BRIEN & BOARDMAN

Beneath the litigigious veneer of this case, there is nothing more than an attempt by petitioner to obtain the right to exercise a stock purchase warrant. The opinion of the Court of Appeals for the Second Circuit demonstrates that petitioner's attempt to elevate this case to the status of a constitutional infringement has no basis in law or fact. The Court of Appeals gave short shrift to petitioner's claims because of their obvious lack of merit. The record of this case which stretches over a decade of litigation clearly establishes that petitioner has had his day in court.

The courts correctly dismissed petitioner's purported claim under §10(b) of the Securities Exchange Act of 1934. Since the decision of the United States Supreme Court in the case of *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), it is beyond cavil that in order to establish a valid claim under §10(b) of the Securities Exchange Act of 1934, a plaintiff must plead and prove that he purchased or sold securities in connection with the alleged fraud. In the instant action Oppenheimer made no such allegations in his second amended complaint.

The decision of the Court of Appeals with respect to petitioner's purported claim under §17(a) of the Securities Act was obviously also correct. "[O]nly a purchaser of securities may invoke the provisions of §17(a) of the Securities Act." *Stirling* v. *Chemical Bank,* 382 F.Supp. 1146, 1150 (S.D.N.Y. 1970), *aff'd.* 516 F.2d 1396 (2d Cir. 1975). *See, also Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461, 463 (2d Cir.), *cert. denied,* 313 U.S. 956 (1952); *Kellman* v. *ICS Inc.,* 447 F.2d 1305, 1308-1309 (6th Cir. 1971); *Duffy* v. *Ranger Securities Corp.,* 346 F.Supp. 1401, 1405 (E.D.N.Y. 1972). Oppenheimer failed to allege, in his pleadings, that

he purchased any securities in connection with the alleged fraud with which Conboy, Hewitt is charged.

As the Court of Appeals still further held, the claim that Conboy, Hewitt (among others) violated 28 U.S.C. 1343 simply has no merit. The claim appears to be the result of an erroneous interpretation of that statute and its companion, 42 U.S.C. 1985. Section 1343(1) grants jurisdiction over actions for damages for injury to person or property or for deprivation of rights by any act in furtherance of a conspiracy set forth in Section 1985, and Section 1343(2) grants jurisdiction over actions for damages against one who fails to prevent wrongs mentioned in Section 1985 where such a person had knowledge that the wrongs were about to occur and had power to prevent them. Section 1985, in turn, is designed to protect rights embodied in the Constitution and laws of the United States and the section does not grant jurisdiction unless a person is deprived of such rights. *See, Johnston* v. *National Broadcasting Co., Inc.,* 356 F.Supp 904 (E.D.N.Y. 1973). While it is not clear what civil right Oppenheimer is claiming was violated, it is clear that the right to exercise a warrant is not among those rights contemplated by Section 1985.

Section 1343(3) grants jurisdiction over an action for the deprivation of any right secured by the United States Constitution under color of state law, statute, ordinance, regulation, custom or usage. Inasmuch as Oppenheimer has made no claim that he was deprived of his right to exercise the warrant under color of state law that subdivision is inapplicable. Section 1343(4) grants jurisdiction over an action "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Even if Oppenheimer had stated a claim

under the securities laws, it is clear that those laws are not contemplated by Section 1343(4). *Eisen* v. *Eastman,* 421 F.2d 560 (1969); *McCall* v. *Shapiro,* 416 F.2d 249 (1969); *Wallach* v. *Cannon,* 357 F.2d 557 (1966); *Stampinato* v. *M. Breger & Co., Inc.,* 270 F.2d 46 (1959); *Koll* v. *Wayzata State Bank,* 397 F.2d 124 (1968). *See, also, Dillard* v. *Family Court, Queens County,* 404 F.2d 404 (1968); *McManigal* v. *Simon,* 382 F.2d 408 (1967); *Ream* v. *Handley,* 359 F.2d 728 (1966); and *Collins* v. *Hardyman,* 341 U.S. 651 (1951).

Again it is not clear from the petition in which manner Oppenheimer claims his civil rights were violated. It is submitted that the only alternatives are the filing of the registration statement on behalf of Electro, which occurred in 1968, the bringing of the interpleader action by Electro in 1969, or the manner in which service was made of Judge Pollack's order to show cause in 1969. No other construction can be placed upon the pleadings and, indeed, these are essentially the only allegations made against Conboy, Hewitt.

The applicable statute of limitations to such claims, assuming *arguendo* their validity, is a New York imposed three year limitation period. See *Johnson* v. *Dailey,* 479 F.2d 86 (1976); *Romer* v. *Leary,* 425 F.2d 186 (1970). Under this statute of limitations, the claims first brought against Conboy, Hewitt in 1974 with respect to alleged acts in 1968 and 1969 are barred.

In affirming the lower court, the Court of Appeals did not discuss the bar of *res judicata,* but traditional principles of *res judicata* barred petitioner's claim. Oppenheimer claimed in his complaints against Conboy, Hewitt that this defendant brought the interpleader action on behalf of Electro as part of an alleged conspiracy to deprive him of

his rightful possession of the warrant. However, in order to recover on this theory, Oppenheimer must prove that Electro was not justified in bringing the interpleader action at the time it found itself presented with the conflicting claims of himself and Fiel to the right to exercise the warrant, and that Electro should have given preference to his claim and ignored Fiel's.

This very issue had been decided by the District Court in the decision of Judge Weinfeld in 1970 which held that Electro was fully justified in bringing the interpleader suit. (A 1) At the bottom of the instant case, Oppenheimer is seeking to relitigate that issue in this action, and, in effect, overturn that holding, from which no appeal was ever taken. This attempt is barred by traditional principles of *res judicata. Klein* v. *Spear, Leeds & Kellogg,* 306 F. Supp. 743 (S.D.N.Y. 1969) and 309 F. Supp. 341 (S.D.N.Y. 1970). See also *Israel* v. *Wood Dolson Co., Inc.,* 1 N.Y.2d 116 (1956); *Zdanok* v. *Glidden Co., Durkee Famous Foods Division,* 327 F.2d 944 (2d Cir. 1964), *cert. denied,* 377 U.S. 934. This decade long litigation was properly brought to an end by the Court of Appeals.

It is impossible to discern from the petition any question of significance for this Court's determination. The petition serves only to emphasize that this case has no importance beyond the particular facts and parties involved. The failure of petitioner to cite any cases in support of his petition demonstrates that the case was properly decided by the Courts below. The petition fails to set forth any considerations of the character enumerated in Rule 19 of this Court which traditionally have influenced the Court to grant certiorari.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be denied.

Dated: New York, New York
November 9, 1979

Respectfully submitted,

RICHARD G. MCGAHREN
Counsel for Respondents
Conboy, Hewitt, O'Brien & Boardman
70 Pine Street
New York, New York 10005

KENNETH A. SAGAT
D'AMATO & LYNCH
Of Counsel